No. 95-266

Supreme Court, U.S.
FILED
JAN 2 1996

In The

Supreme Court of the United States

October Term, 1995

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr., Deceased,

Petitioner,

vs.

MARYLU REDMOND, Hoffman Estates Police Officer and Village of Hoffman Estates, Illinois,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR AMICUS CURIAE, INTERNATIONAL UNION OF POLICE ASSOCIATIONS, AFL-CIO IN SUPPORT OF AFFIRMANCE

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ISSUE

Is there a limited psychotherapist/patient privilege rooted in Federal Rule of Evidence 501 which, applied on a case by case basis, protects formal duty related counseling sessions between law enforcement officers and licensed clinical social workers?

THE *AMICUS CURIAE* AND ITS INTEREST

The *amicus curiae* is the International Union of Police Associations, AFL-CIO. Both the respondents and the petitioner have consented to the submission of this *amicus curiae* brief. The brief supports the respondent's argument that the decision of the Seventh Circuit in this case should be upheld.

The International Union of Police Associations, AFL-CIO ("I.U.P.A.") is extremely interested in, and qualified to comment upon, whether there is a privilege which protects formal duty related counseling sessions between law enforcement officers and licensed clinical social workers.

The I.U.P.A. is the AFL-CIO's law enforcement affiliate. It is composed of over three hundred affiliated police unions and associations representing over 80,000 working street level law enforcement officers in over four hundred law enforcement agencies throughout the United States, Canada and Mexico. The I.U.P.A. regularly represents the rights of individual officers during department internal affairs investigations, discipline cases, workers compensation matters, civil service hearings, and pension and employee disability boards of review and commissions. It represents its members in all job related matters, including those directly related to their physical and mental health.

In the 1960's the United States as a whole had 3.3 police

officers for every violent crime reported per year. In 1993, it had 3.47 violent crimes reported for every police officer. A police officer today must deal with 11.45 times as much violent crime as his or her predecessor of even two decades ago. *See* Adam Wallinsky, *The Crisis of Public Order,* The Atlantic Monthly, July 1995, at 39. In Milwaukee in 1965 there were twenty-seven murders, thirty-three rapes, and 214 robberies. In 1990, when the city was smaller, there were 165 murders, 5,988 rapes, and 4,472 robberies. *Id.* These changes are reflected nation wide. The problems they generate are being struggled with in every law enforcement agency in which the I.U.P.A. has members.

The President and Congress are currently struggling over an effort to put 100,000 more officers on the streets. As Adam Walinsky has demonstrated in his July *Atlantic* article —

> If you wished to return to the ratio of police officers to violent crimes which gave many of us peace and security in the 1960's, we would have to add not 100,000 new police officers but about five million.

Id. at 40. The I.U.P.A. recognizes that such an increase in the number of officers is not likely. Those who represent working law enforcement officers have no choice but to invest every possible effort to protect the health, safety and family lives of those officers who must face the increasing stress of dealing with the current reality. The Seventh Circuit decision in this case recognized that reality:

> The need, and demand, for counseling services has skyrocketed during the past several years due to the rapid spread of violence and crime throughout our nation. Countless innocent bystanders, as well as law

> enforcement officers themselves, witness violent crimes and homicides. These unfortunate individuals . . . need and deserve help, support, and emotional release provided by confidential counseling.

Jaffee v. Redmond, 51 F.3d 1346, 1355 (7th Cir. 1995).

The I.U.P.A., its related Institute for Police Research, and its Milwaukee Police Association affiliate sponsored a major study of police officer stress and health undertaken by Dr. Lawrence Blum, a nationally prominent expert of police stress. The study was conducted in the City of Milwaukee in the wake of the infamous Dahmer incident. As a result of that study and the I.U.P.A.'s involvement in the United States Department of Justice's recent emphasis on community policing and placing more working officers on the streets, the I.U.P.A. has been particularly involved with the problems faced by police officers in an atmosphere of increasing violence on the streets of America.

The I.U.P.A. Executive Officers, President Sam Cabral and Secretary Treasurer Art Reddy, and its Executive Board have made dealing with the problem of stress and its impact on the working lives, health, family lives, and simple sanity of its members one of their highest priorities.

There is no issue of greater importance to the I.U.P.A. than insuring that law enforcement officers on the street, facing literally unbelievable stress arising from participating in and witnessing extreme traumatic events, face no impediments or unnecessary fears when deciding whether or not to accept formal, professional on the job counseling.

STATEMENT OF THE CASE

In 1991, Village of Hoffman Estates Police Officer Marylu Redmond responded to a fight at an apartment development at which she shot and killed Ricky Allen, Sr. Ricky Allen's shooting was the result of a split second, literally life or death situation, just like the situations faced by many law enforcement officers everyday.

As the Seventh Circuit noted in footnote 12 of its decision:

> Each of the witnesses to the shooting testified that no more than four or five seconds elapsed from the time Ricky Allen, Sr., carrying a butcher knife, emerged from the door of the apartment building until the time Officer Redmond fired her weapon. Officer Redmond was forced to make a life or death decision in a matter of seconds as she observed the butcher knife in the hand of the assailant move downward toward the back of his intended victim. [District Court] Judge Shadur commented that "one of the problems with [defendants' proposed instruction is that] the split second business is . . . so inconsistent with [Officer Redmond's] own testimony." The situation Officer Redmond faced did not become life-threatening until the very moment when she observed Ricky Allen, Sr. project the butcher knife he held raised above his head in a downward motion toward the back of his intended victim. For that matter of seconds before Allen reached the man he was pursuing, Officer Redmond had no time to cogitate, wait or reflect on the

> question of whether or not to use deadly force. But once Ricky Allen, Sr. came within striking distance of the man he was chasing, Officer Redmond was forced to make a split-second decision to discharge her weapon in an attempt to save the life of Allen's intended victim. The fact that Officer Redmond may have observed Ricky Allen, Sr. chasing another man in a time frame of four or five seconds prior to the fatal moment does not change the instantaneous and split-second nature of the decision she was forced to make.

Jaffee, 51 F.3d 1356 at n. 12.

As a result of her involvement in the shooting, Officer Redmond underwent over six months of therapy with a clinical social worker retained by her employer.

But the tragedy did not end there. Officer Redmond went through a trial as a result of the shooting where she was accused of an improper use of force. The district court instructed the jury that the insistence by both Officer Redmond and her counselor on a clinical social worker's confidentiality privilege could be used to draw a negative inference about what Officer Redmond may have said in counseling. The jury awarded Allen's estate over one half million dollars as a result.

Carrie Jaffee, Ricky Allen's mother, sued in the United States District Court seeking damages under 42 U.S.C. § 1983 and an Illinois "wrongful death" statute. At trial, the factual issue was whether Redmond's shooting of Allen was reasonable within the meaning of the Fourth and Fourteenth Amendments and the Illinois statute. The trial revealed considerable discrepancies as to what occurred outside the apartment house. Officer Redmond

testified that she shot Allen as he chased another man with a butcher knife, and only after repeated warnings to drop the knife. Witnesses for the defense, Allen's relatives, testified that Allen was unarmed and posed no threat to anyone.

During pretrial discovery Allen's estate sought evidence concerning communications made between Officer Redmond and Karen Beyer, a clinical social worker, employed by the Village of Hoffman Estates to whom Redmond went for professional counseling after the incident. Redmond refused to answer questions regarding her counseling sessions and resisted a deposition of Beyer. She claimed that her confidentiality interest in post-traumatic counseling outweighed the government interest obtaining the evidence. Consequently, she argued, communications between she and Beyer were privileged within the meaning of Federal Rule of Evidence 501.

Eventually, the district court denied the privilege and sanctioned Officer Redmond for refusing to authorize the release of Beyer's notes. In addition, the district court instructed the jury that it could draw a negative inference from Redmond's refusal to produce the notes. The jury awarded Carrie Jaffee $545,000.

On appeal, the Seventh Circuit Court of Appeals reversed and remanded, finding that job related communications between law enforcement officers and licensed clinical social workers were protected by a limited psychotherapist/patient privilege under its application of Federal Rule of Evidence 501.

ARGUMENT

The *amicus curiae* brief does not restate or focus on the arguments set forth by the Seventh Circuit in its opinion or on those arguments raised most appropriately in respondent's brief. It also is not a point-by-point rebuttal of petitioner's brief. It does

not concern itself centrally with the treatment of general privilege law as addressed by the various Court of Appeals.[1] Rather, the

1. In this case the Seventh Circuit held that Federal Rule of Evidence 501 includes a psychotherapist/patient privilege. The extent of the privilege, and whether it applies in a specific case, should be determined by "balancing the interests protected by shielding the evidence sought with those advanced by disclosure". *Trammel v. United States*, 445 U.S. 40, 48 (1980); *In re Zuniga*, 714 F.2d 632, 644 (6th Cir. 1983). The Seventh Circuit then held that communications between counselors and officers during post-trauma therapy required confidentiality such that the privilege applied. The Second and Sixth Circuits have also recognized a psychotherapist/patient privilege in Rule 501. *See In Re Zuniga*, 714 F.2d 632 (6th Cir. 1983); *In Re Doe*, 964 F.2d 1325 (2d Cir. 1992). The Fifth, Ninth, Tenth, and Eleventh Circuits have rejected the privilege. However, the circuits denying the privilege usually faced criminal cases and correspondingly high government interests in admitting communications between counselors and criminal defendants. *See United States v. Butrum*, 17 F.3d 1299 (10th Cir. 1994) (The court rejected the psychotherapist/patient privilege, but specifically limited it's holding to criminal child abuse cases); *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir.1989), *cert. denied*, 493 U.S. 906 (1989) (The court rejected the privilege in Grand Jury murder investigation); *United States v. Corona*, 849 F.2d 562 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989) (The court rejected the privilege in firearms case, specifically stating that the privilege did not apply in federal criminal trials); *United States v. Meagher*, 531 F.2d 752 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976) (The court rejected the privilege in a bank robbery trial in which defendant pled insanity, noting that even Proposed Rule of Evidence 504 would not apply the privilege to cases in which mental condition was an element of the defense.); *United States v. Moore*, 970 F.2d 48 (5th Cir. 1992) (The court refused to apply the privilege to a psychiatrist seeking to withhold a patient list during an I.R.S. investigation); *Hancock v. Hobbs*, 967 F.2d 462 (11th Cir. 1992) (The court refused to allow the privilege to prevent introduction of the fact that the plaintiff had received psychiatric treatment).

No Circuit besides the Seventh has reviewed a claim to a psychotherapist\patient privilege in a civil context where a police officer's interest in confidentiality far outweighs the plaintiffs need for one additional piece of evidence. In the context of an officer involved in trauma related counseling, the societal interest in exercising the privilege is significant. In

(Cont'd)

I.U.P.A., on behalf of working level law enforcement officers, seeks to set forth the need for a clear enunciation by the Court of a limited psychotherapist/patient privilege in the context of law enforcement post-traumatic event counseling.

No one disagrees with the basic framework of the law to be applied here. Under the Federal Rules of Evidence evidentiary privileges are controlled by "principals of common law as they are interpreted by the Courts of the United States in light of reason and experience." Fed. R. Evid. 501. The rules of privilege under Rule 501 are to be developed on a case by case basis using a test which balances the interests protected by shielding the evidence sought with those advanced by disclosure. *See Trammell v. United States*, 445 U.S. 40 (1980). The issue before the Court is whether the Seventh Circuit is correct in holding that —

> Officer Redmond, and all those placed in her most unfortunate circumstances are entitled to be protected in their desire to seek counseling after mortally wounding another human being in the line of duty. An individual who is troubled as the result of her participation in a violent and tragic event, such as this, displays a most commendable respect for human life and is a person well suited 'to protect and to serve.' Based on the facts and circumstances presented on this record, we recognize the existence of the psychotherapist/patient privilege in this Circuit and thus the confidential communications between Marylu Redmond

(Cont'd)
this precise situation, a civil case with a high personal and societal interest in a mentally healthy police force and a relatively low need for additional evidence, the balancing test favors application of the privilege.

> and her licensed clinical social worker Karen Beyer are protected from compelled disclosure.

Jaffee, 51 F.3d at 1357. Whatever the extent and limits of any counseling privilege, they must be sufficiently broad to protect police officers who seek professional counseling after on duty traumatic events. If a counseling privilege to that extent is not recognized and protected by this Court, it is highly unlikely that working police officers will seek or cooperate in post-traumatic counseling because:

(a) under this Court's *Miranda* rules, police counsel citizens every day that "whatever you say may be used against you";

(b) under its rule in *Garrity*, police are counseled in every internal affairs investigations that they need not cooperate unless they are immunized themselves:

(c) due to the nature of their job, they are extremely skeptical about "psycho babble"; and

(d) they suffer on a day-to-day basis at far higher than normal levels of stress without seeking counseling.

The inherent nature of police work causes police officers significant levels of stress and stress related physical and mental manifestations. Dr. Lawrence Blum, Ph.D., a clinical psychologist who has treated law enforcement officers for over 16 years, conducted a study of stress on police officers in Milwaukee, Wisconsin. Blum, "Final Report Milwaukee Police Association Interest Arbitration Hearings," April 15, 1994. In the study, Dr. Blum received clinical data and received anonymous questionnaires of approximately 1,000 police officers and

conducted a revie of the literature of stress, occupational stress and police stress.

Dr. Blum reports that a substantial body of literature has studied the association of police stress and has found a strikingly greater proportion of health, family and emotional disturbances documented in police officers than in comparison groups.[2]

2. Dr. Blum reviewed and analysed over 450 reports, articles and books on these issues; including White, Biggerstaff and Grubb, *Factors of Stress Among Police Officers*, 12 Criminal Justice and Behavior, 111 (1985); Singleton and Teahan, *Effects of Job Related Stress on the Physical and Psychdlogical Adjustment of Police Officers*, 6 Journal of Police Science and Administration, 355 (1978); Heiman, *Suicide Among Police*, 134 American Journal of Psychiatry, 1286 (1977); Anson, and Bloom, *Police Stress in an occupational context*, 16 Journal of Police Science and Administration, 229 (1988); French, *A Comparative Look at Stress and Strain in Policemen* in *Job Stress and the Police Officer: Identifying Stress Reduction Techniques* (1975); Cooper, *Stress in the Police Service*, 24 Journal of Occupational Medicine, 30 (1982); Greller, *Police Stress: Taking a Department-Wide Approach to Managing Stressors*, The Police Chief, 44 (1982); Grencik, *The Physical Fitness of Deputies Assigned to Patrol Function and its Relationship to the Formulation of Entrance Standards*, LEAA Final Report (1973); Grenrick, *Towards an Understanding of Stress in Job Stress and the Police Officer: Identifying Stress Reduction Techniques* (1975); Hageman, *Occupational Stress of Law Enforcement Officers and Marital and Familial Relationships*, 6 Journal of Police Science and Administration, 402 (1978); Hageman, *Responses of Police Rookie Officers to Stress*, 10 Journal of Police Science and Administration, 235 (1982); Johnson, *A Comperative Study of Stress Between Police Officers and Correctional Officers*, Master of Criminal Justice Thesis (1987); Kroes, *Psychological Stress and Police Work*, Paper presented at the Third Annual Symposium of the American Academy of Stress (1974); Kroes, *Society's Victim: The Policeman: An Analysis of Job Stress in Policing* (1975); Kroes, *Society's Victim: The Policeman* (1976); Kroes, *Job Stress and the Police Officer* (1975); Langone, *When Cops Crack Up*, Discover, 84 (1981); Lewis, *Toward an Understanding of Police Anomie*, 1 Journal of Police Science and Administration, 484 (1973); Maslach, *Burned-Out Cops and Their Families*, Psychology Today, 59 (1979); Niederhoffer, *The*
(Cont'd)

Frequently, police will experience post-traumatic stress symptoms which a civilian would recognize as needing treatment but which police identify as "nothing but the unpleasant side affects of the job." Final Report, at 75 .

Exceedingly high percentages of officers reported experiencing continued and/or repeated stress reactions such as feelings of fatigue even after rest, trouble falling asleep, multiple awakenings when sleeping, stiff painful feeling in muscles without injury, heart burn, being easily irritated or annoyed, feelings of nausea or sour stomach and backache or muscle spasm without injury. Dr. Blum found that these symptoms are caused by police officer's body's excessive prolonged maintenance in a "fight or flight" condition in which the body excretes excessive adrenaline, noradrenaline, adrenocorticotropic hormone and cortisol. Final report, at 4-5. Dr. Blum states

> the data reviewed in the literature, and my own clinical experience of 16 years of service to law enforcement, suggests clearly that psychological and psychosocial counseling,

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Police Family: From Station House to Ranch House (1971); Selye, *Police Stress*, 1 Police Stress Magazine, 1 (1981); Skolneck, *A Sketch of the Policeman's Working Personality*, Criminal Justice-Law and Politics (1972); Sparrow, *Coronary Heart Disease in Police Officers Participating in the Normative Aging Study*, 118 American Journal of Epidemiology, 508 (1983); Speilberger, *The Police Stress Survey: Sources of Stress in Law Enforcment*, Human Resources Institute, (1980); Stratton, *Post-Traumatic Stress: Study of Police Officers Involved in Shootings*, Psychological Reports, 127 (1984); Tang, *The Effects of Hardiness, Police Stress, and Life Stress on Police Officers' Illness and Absenteeism*, 21 Public Personnel Managment, 493 (1992); Violanti, *The Police Stress Process*, 11 Journal of Police Science and Administration, 112 (1984); Violanti, *The Police Stress Process*, 11 Journal of Police Science and Administration, 389 (1983); Wallace, *Stress and its Impact on the Law Enforcement Officer*, 4 Campus Law Enforcement Journal, 36 (1978).

> and psychological debriefing for dysphoric or damaging reactions developed in the course of their work, are critical components of officer wellness, safety, and viability.

[Letter Report of December 28, 1995].

The most critical time period in the development of post-traumatic stress symptoms is within the first 72-hours. The sooner an officer is "debriefed" or receives counseling within this period, the better his or her adjustment to the incident will be. Final Report, at 73. However, most of the encounters police face on the job which result in their developing post-traumatic reactions do not result in the officer receiving any psychological services. Final Report, at 37.

The report amply demonstrates that the current violent state of our society compels a need greater than ever before for officers to receive counseling. It is not only in the officer's individual interest to receive such counseling, but it is also in society's interest to have physically and emotionally healthy officers who are able to perform to the utmost of their ability. To meet this societal goal, society must encourage law enforcement officers to receive counseling and psychological services.

Without even addressing the impact on police officers, Petitioner dismisses the point that a lack of confidentiality will deter people from attaining psychotherapy. Petitioner's brief at at 29-30. However, law enforcement officers, unlike the public generally, are uniquely sensitive to the issues of confidentiality. If a police officer knows that his or her conversations with a counselor are not confidential and privileged, the officer will be even more reluctant to attend counseling.

As a direct result of their work, law enforcement officers develop a particular caution towards speaking to anyone. From

their first day in academy training, officers are drilled that they must provide adequate *Miranda* warnings to anyone placed under arrest. As this Court required in *Miranda*, officers must warn suspects not to talk or the information could be used against the suspect. *Miranda v. Arizona*, 384 U.S. 436 (1966).

Similarly, in *Garrity*, this Court also ruled that police officers must be advised in the course of an internal investigation that they should not speak because anything said could be used against them. *Garrity v. New Jersey*, 385 U.S. 493 (1967). The *Garrity* ruling requires that officers only speak in an internal investigation once they are first provided with immunity. Only after they receive such assurances can they then feel free to speak.

The nature of police work itself produces a sensitivity and caution towards speaking freely. As a result, police officers, more than other professions, need a guarantee of confidentiality before they can be free to speak with a counselor. Police already are reluctant to attend much needed counseling. In Dr. Blum's study, he notes that while police ranked third out of 130 occupations in the suicide rate, they only ranked 70th for availing themselves of services at community mental health centers. *See also*, Fell, Richard, and Wallace, "Psychological Job Stress and the Police Officer," *Journal of Police Science and Administration*, 8 at 142-144 (1980).

Dr. Blum found that

> It is also clear that police officers will not use these necessary counseling resources without absolute assurance of the confidentiality of their interactions with psychological, and psychosocial, resources.

[Blum Letter Report December 28, 1995].

CONCLUSION

In this context, the dangers to law enforcement and to society's ability to combat crime while developing a community policing[3] environment are very high. The evidentiary need for disclosure of the contents of post traumatic counselling of police officers in the interest of "the public's right to every man's evidence," a theoretical search for ultimate truth, a need to test the veracity of police officer, or even the need to ultimately guarantee citizen's rights against excessive police intrusion, do not and cannot outweigh the interest of society in developing a sane, humane police force equipped with a mature and healthy understanding of the dangers it's officers face everyday and the societal interest in the most advanced methods of professional "stress handling", readily available when needed, including *confidential* post-trauma counseling.

For all of the reasons set forth above the Court should uphold the Seventh Circuit rule establishing a limited psychotherapist/patient privilege for law enforcement officers seeking trauma counseling.

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3. *See, e.g.*, Wadman, Olson, *Community Wellness: A New Theory of Policing* (1990); Goldstein, *Problem Oriented Policing* (1990);Goldstein and Susmilch, *The Problem Oriented Approach to Improving Police Service, A Project on Development of a Problem Oriented Approach to Police Service* (1981); Green and Mastrofski, *Community Policing: Rhetoric or Reality* (1988); Kelling, *Police and Communities: The Quiet Revolution*, National Institute of Justice and Harvard (1988); Pierce, Spaar and Briggs, *The Character of Police Work* (1984); and Reiss and Tonry (eds.), *Communities and Police* (1986).

Respectfully submitted

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4. Third year William and Mary law student, Christopher R.K Leibig, assisted in the preparation of this brief.